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No. 84-1246

IN THE

Supreme Court of the United States

October Term, 1984

ERIC DAHLBERG,

Petitioner,

v.

CARL F. BECKER and GOVERN, McDOWELL & BECKER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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January 31, 1985

Questions Presented

1. Does the commitment order of a state court lack the quality of "state action" because the court issued the order through negligence or inadvertance?

2. Were the respondent attorneys "state actors" when, by drafting and obtaining a state court order *ex parte*, and having it enforced, they caused petitioner to be summarily jailed without grounds and held until respondents authorized his release?

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IN THE

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No. 84-

ERIC DAHLBERG,

Petitioner,

v.

CARL F. BECKER and GOVERN, MCDOWELL & BECKER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioner Eric Dahlberg respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 9, 1984.[1]

[1]The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals whose judgment is sought to be reviewed.

Opinion Below

The opinion of the Court of Appeals, reported at 748 F2d 85, appears in the Appendix hereto, beginning at App. 1. The opinion of the District Court for the Northern District of New York is reported at 581 FSupp 855, and is reproduced in the Appendix beginning at App. 19.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 9, 1984, and this petition for certiorari was filed within 90 days. Jurisdiction is conferred by 28 USC 1254(1).

Constitutional Provisions and Statutes Involved

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

Amendment XIV

> Section 1. . . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . .

42 USC Sec. 1983

> "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other per-

son within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Statement of the Case

This is a civil action for damages founded on 42 USC 1983 and the Fourth and Fourteenth Amendments. Federal jurisdiction is conferred by 28 USC 1331 and 1343.

The complaint was dismissed on its face for failure to state a claim.

Petitioner alleges that the respondent attorneys prepared and, *ex parte*, obtained a judge's signature on a state court commitment order for civil contempt. The stated object of the order was to compel petitioner to sign documents and pay sums of money to the respondent attorneys and their client.

The order did not append the documents, or describe them, and it did not specify the fee to be paid to the attorneys.

The attorneys transmitted the order to the sheriff. The sheriff arrested petitioner and took him before a County Judge. Petitioner was then and there willing and able to sign the documents and pay the money, in order to avoid jail. However, the judge could not determine from the commitment order what documents petitioner was to sign or how much petitioner was to pay the respondent attorneys. As a result, he ordered petitioner committed to jail pending authorization from the respondent attorneys.

On the following day, the attorneys prescribed their fee, identified the documents and authorized the judge to release petitioner, and the judge did so.

Petitioner sued the attorneys, their client, and the sheriff.

The district court dismissed the complaint as to the respondent attorneys and their client for failure to state a claim under 42 USC 1983 in that the complaint failed to allege that they acted under color of state law. The action against the sheriff was later dismissed by stipulation and order.

Petitioner appealed as to the respondent attorneys. The Court of Appeals for the Second Circuit affirmed on the ground that there was no demonstration either of state action or a state actor.

Reasons for Granting the Writ

The decision below sharply limits the scope of state action, based on a misreading of a recent decision of this Court, and is contrary to other controlling decisions of the Court.

The Court of Appeals held that the commitment order of a state court was not state action.

Until that decision, it was settled that judicial action is state action. Only last term, this Court reaffirmed: "The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment. [citing *Shelley v. Kraemer*, 334 US 1, and *Ex Parte Virginia*, 100 US 339]" *Palmore v. Sidoti*, ____ US ____ 104 S Ct 1879, 1881 fn. 1.

A. State Responsibility

The Court of Appeals excepted from state action negligent or inadvertent judicial action.[2] The court misread *Lugar v. Edmondson Oil Co.*, 457 US 922, to compel this extraordinary result.

In *Lugar*, the Court discussed "state responsibility" as a necessary component of state action.

> "[T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* at 937.

The "rule of conduct" concept misled the Court of Appeals to hold that actions of high state officials are removed from limitation by the Fourth and Fourteenth Amendments, if the actions are taken by mistake.

> "Where a state judge's single, isolated error in signing a defective order was due to oversight or negligence, such nonfeasance may hardly be characterized as a rule." App. 13.

The Court of Appeals failed to acknowledge that the orders of a state judge causing loss of liberty derived their force from state sovereignty.[3] They therefore constitute

[2]The Court of Appeals' decision discusses judicial action but its reasoning applies to decisions made by other state officials.

[3]*Cf. Dennis v. Sparks*, 449 US 24, where a private party's liability under section 1983 flowed from privately inducing a state judge to issue an injunction. The Court of Appeals distinguished *Dennis* from this case and struggled to bring it within the "rule of conduct" concept. The Court of Appeals considered that because the judge's error in *Dennis* was intentional, "one intentional act can signify the presence of a 'rule of conduct', even in its infancy." App. 13.

state action as "the exercise of some right or privilege created by the State," *Lugar v. Edmondson Oil Co., supra*, 457 US at 937.

The state character of a court order is unaffected by the reasons why it is made. Since *Monroe v. Pape*, 365 US 167, it has been settled that state action exists whenever state officials exercise their official power whether "by reason of prejudice, passion, *neglect*, intolerance or otherwise . . . [emphasis added]." *Id.* at 180. In contrast, the Court of Appeals' exception to state action turns on the subjective intent of the state official.

Moreover, the Second Circuit rule is inconsistent with recent decisions of the Court addressing the issue of "what process is due" under the 14th Amendment. The state action predicate for those decisions makes clear that the subjective intent of the state actor does not determine the issue of state action. *Logan v. Zimmerman Brush Co.*, 455 US 422, 436, (state officials' failure to act may have occurred "through negligence, maliciousness or otherwise"); *Parratt v. Taylor,* 451 US 527 (state employees engaged in negligent unauthorized actions).

B. State Actor

The Constitution imposes a duty on the states to respect the liberty of their citizens. None may be jailed without lawful cause.

State judges abdicated this duty when they ordered petitioner's commitment and remanded him to jail. These orders caused petitioner to be jailed, not because he refused to obey a court order, but because state officials did not know what he was supposed to do to retain or regain his liberty.

This vacuum of state control over its processes permitted the respondent attorneys to secure commitment of a civil contemnor who was willing and able to comply and to delay needlessly his release from jail. The combined actions of the attorneys and state officials removed the keys to the jail beyond petitioner's reach.

The Court of Appeals held that, absent a meeting of the minds between state officials and the private attorneys to deprive petitioner of his liberty wrongfully, the connection between state officials and the private attorney was insufficient to subject the attorney to suit under section 1983. App. 16-17.

Overt conspiracy has never before been necessary to subject a private party to suit under 1983. Indeed, the Court in *Lugar v. Edmondson Oil Co., supra*, rejected a state connection test which required more than mere joint participation.

When negligence or inaction by the state is the reason why a private party is able to deprive another of protected rights, this Court permits suit against the private actor to redress the deprivation.

> "But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." *Burton v. Wilmington Parking Authority,* 365 US 715, 725.

Prior to the opinion below, the hallmark of state action was the exercise of sovereign power, regardless of why it may have been exercised, or by whom. The Court of Appeals' opinion revolutionizes that accepted meaning of state action. As state action is a recurrent and important

issue, it is vital to have the Court pass upon any major qualification of its settled meaning.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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January 31, 1985

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1374 — August Term, 1983

(Argued: June 20, 1984 Decided: November 9, 1984)

Docket No. 84-7219

ERIC DAHLBERG,

Plaintiff-Appellant,

—against—

CARL F. BECKER; GOVERN, MCDOWELL & BECKER; ELLEN M. DAHLBERG; and HARVEY E. STODDARD, JR.,

Defendants,

CARL F. BECKER; GOVERN, MCDOWELL & BECKER; and ELLEN M. DAHLBERG,

Defendants-Appellees.

Before:

MESKILL, CARDAMONE and ROSENN,* *Circuit Judges*

Appeal from an order of dismissal granted by the United States District Court for the Northern District of New York (Miner, *J.*) pursuant to Fed. R. Civ. P.

* Honorable Max Rosenn, United States Circuit Judge for the Third Circuit, sitting by designation.

12(b)(6) on the grounds that plaintiff's complaint, asserting his over-night imprisonment for failure to pay maintenance arrearages to his former wife violated his civil rights, failed to state a claim for relief under 42 U.S.C. § 1983.

Affirmed.

HERBERT JORDAN, Roxbury, New York (Randlett Walster, Rural Legal Rights Foundation, Inc., Roxbury, New York, of counsel), *for Plaintiff-Appellant.*

JOHN E. HUNT, Utica, New York (Andrea Lynch, Kernan and Kernan, P.C., Utica, New York, of counsel), *for Defendants-Appellees Carl F. Becker and Govern, McDowell and Becker.*

CARDAMONE, *Circuit Judge:*

This appeal from an order, dismissing plaintiff's complaint for failure to state a claim, made by the United States District Court for the Northern District of New York (Miner, *J.*), presents a question of first impression that involves the well-known litany of Title 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

> be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Despite our familiarity with the refrain, the scope and meaning of the words have not proved easy to define. This case provides yet another opportunity to explore the contours of § 1983. In venturing into the unplumbed depths of "state action," a sense of the strong yet uncertain cross-currents in this area of the law leads us to hug the known legal shore as closely as possible.

I

The facts in this case stem from a dispute between plaintiff, Eric Dahlberg, and defendant, Ellen Dahlberg, his former wife. A matrimonial proceeding between them ended in a default divorce and a stipulation of settlement which was executed by the parties and later incorporated in a June 1982 decree. When the plaintiff failed to make the payments required by the stipulation, his wife's attorneys—co-defendants in the present litigation—prepared an order to show cause why he should not be held in contempt. The order stated that plaintiff owed defendant $1,785 for maintenance and $800 in costs and fees to her attorneys and that he had neglected to execute certain documents, including a promissory note for $8,000 and security instruments covering certain machinery.

The show cause order, presented *ex parte* on November 23, 1982 to an Acting New York State Supreme Court Justice for Delaware County, was made returnable in December at Special Term. When neither plaintiff nor his attorney appeared on the return date, the Special Term Justice found Dahlberg guilty of contempt and signed an order which provided that he could purge himself of contempt by paying the maintenance arrearage

and signing the requisite promissory notes and financing statements. The order also stated that further noncompliance on Dahlberg's part would cause an order of commitment to issue. When Dahlberg again failed to respond, Special Term signed a commitment order that resulted in Dahlberg's arrest on June 7, 1982 by the Sheriff of Schoharie County. After plaintiff was transported to the county jail, he was advised that to obtain his release he would have to pay $300 in maintenance, $2500 in attorneys' fees, plus the sheriff's fees. Upon reading the order of commitment, the Schoharie County Court Judge who conducted the arraignment told Dahlberg that he had no alternative but to hold him without bail. Later that same afternoon Dahlberg's friends provided him with the necessary funds, promissory notes and financing statements. Despite plaintiff's willingness to meet these obligations, the County Court Judge refused to order plaintiff's release absent authorization from either a State Supreme Court Justice or Ellen Dahlberg's attorneys. Plaintiff was therefore confined overnight in the Schoharie County jail. The next morning, June 8, defendant's attorneys telephoned the County Court Judge and authorized plaintiff's release, contingent on his signing the requisite documents and paying the maintenance and attorneys' fees. Shortly before noon Dahlberg was again before the county court where he signed the documents, paid the fees and obtained an order releasing him from jail.

Based on these events, plaintiff commenced the present action in district court pursuant to 42 U.S.C. § 1983. In his complaint he alleges that Ellen Dahlberg and her attorneys acted under color of state law to cause his unlawful arrest and imprisonment violating his Fourteenth Amendment rights. Specifically, Dahlberg

asserts that defendants intentionally and/or negligently: (a) prepared a false affidavit and submitted it to the New York State Supreme Court in support of the show cause order as a basis for obtaining a promissory note and financing statements to which, he alleges, defendants were not entitled; (b) omitted from the order to show cause the notice and warning required by section 756 of the New York Judiciary Law;[1] (c) violated section 761 of the New York Judiciary Law[2] by serving an order to show cause for contempt upon an attorney whose authority had expired; and (d) failed to include with the commitment order either the actual promissory note and financing statements or a satisfactory description of those documents so that the County Court Judge could assess plaintiff's compliance and thereby avoid his needless incarceration. As a result, Dahlberg claims to have suffered damages from lost work, work improperly

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[1] Section 756 states, in pertinent part:

> An application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense, or by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. . . . The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type:
>
> WARNING:
> YOUR FAILURE TO APPEAR
> IN COURT MAY RESULT IN
> YOUR IMMEDIATE ARREST
> AND IMPRISONMENT FOR
> CONTEMPT OF COURT

N.Y. Jud. Law § 756 (McKinney Supp. 1983).

[2] "An application to punish for contempt in a civil contempt proceeding shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge." N.Y. Jud. Law § 761 (McKinney Supp. 1983).

performed by unsupervised employees, injury to business reputation, as well as extreme shock, outrage, degradation and humiliation.

Ruling on a motion to dismiss pursuant to Fed. R. Civ.P. 12(b)(6), Judge Miner concluded that Dahlberg's complaint failed to state a claim upon which relief can be granted. He found it clear that neither Ellen Dahlberg nor her attorneys acted under color of state law. Plaintiff has not appealed the dismissal of his suit against Ellen Dahlberg. In his appeal of the dismissal of his suit against defendant attorneys, plaintiff renews his contention that through their joint participation with a state official as well as their independent exercise of power allegedly ceded to them by a state official they acted under color of state law. Although we affirm the result reached by the district court judge, we do so for somewhat different reasons.

II

Since the judgment below was premised on Fed. R. Civ.P. 12(b)(6), we note at the outset that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, in passing on a motion to dismiss, the allegations of the complaint must be construed in favor of the plaintiff. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974); *Fine* v. *City of New York*, 529 F.2d 70, 75 (2d Cir. 1975). Even accepting Dahlberg's allegations as true, his complaint does not state a cause of action under 42 U.S.C. § 1983.

We start with the words of the Fourteenth Amendment that no State shall deprive any person of life,

liberty or property without due process of law. By enacting 42 U.S.C. § 1983 Congress provided a remedy for a claimed violation of this constitutional guarantee. The statute permits suit upon deprivation under color of any state statute, ordinance, regulation, custom or usage of one's life, liberty or property without due process of law. Section 1983 protects an individual's rights against governmental action, as distinct from private action, whether the government is state or municipal. As a corollary, individuals are also protected against acts of private parties who act in concert with government officials.

In order to allege a good cause of action, plaintiff must charge first that the conduct complained of has deprived him of a constitutionally-protected right; and second, that the conduct allegedly causing the deprivation was fairly attributable to the State. The Supreme Court has set forth a two-part analytical approach to this question of "fair attribution." Plaintiff must show that the allegedly wrongful action occurred as a result of the exercise of a state-created right or privilege, or by a state-imposed rule of conduct. Plaintiff must also show that the party charged with the deprivation is a person who is a state official or someone whose conduct is otherwise chargeable to the State. In other words, to establish deprivation of a federally-protected right there must be both "state action" and a "state actor." [3]

Since both parties to this appeal rely on *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982), to support their

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[3] We recognize that the concept encompassed by "state action" and "state actor" overlap. They collapse into each other when the the claim of a constitutional deprivation is directed against a public official. The two requirements diverge only when the claim is directed against a private party.

opposing conclusions, we undertake to analyze it in some depth. The facts are relatively simple. A truckstop operator in Virginia indebted to his supplier was sued in state court on the debt. Simultaneously, the supplier sought prejudgment attachment of the debtor's property pursuant to Virginia law. Acting upon the supplier's *ex parte* petition, a state court clerk issued a writ of attachment that was executed by the county sheriff. As a result, the debtor's property was sequestered for 34 days, at which time the attachment was dismissed due to the supplier's failure to establish a statutory basis for the issuance of the writ. The debtor thereupon sued under § 1983 alleging that the supplier, a private party, had acted jointly with the State to deprive him of his property without due process of law. *Id.* at 924-25.

Lugar proceeded to outline a standard for determining the presence of state action. The Court held that the conduct causing the deprivation of a federal right must be fairly attributable to the State and, accordingly, proposed a two-pronged approach to determining "fair attribution."

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937. *Lugar* then examined the two counts of plaintiff's complaint in light of its test. Count one asserted

that Virginia's prejudgment attachment statute was constitutionally defective. Count two simply alleged plaintiff's deprivation came about by defendant's unlawful acts. The Court considered count two first and held that it failed to satisfy the first prong because it did not charge conduct that could fairly be attributed to any state governmental decision or rule. Rather, the Court specifically asserted that defendants invoked the state statute in abuse of and in direct contravention to relevant state policy. *Id.* at 940. Thus, the Court held that count two failed to assert a valid § 1983 claim because it did not satisfy the state action or first prong of the fair attribution test.

The Court then examined count one and found that it met the first prong of the fair attribution standard. As the Court noted: "While private misuse of a state statute [*i.e.*, count two] does not describe conduct that can be attributed to the State, the procedural scheme created by the statute [*i.e.*, count one] obviously is the product of state action." *Id.* at 941. It next applied the second prong of the test to the allegations in count one. It observed that a private party's "joint participation" with state officials in the seizure of disputed property will suffice to characterize that party as a state actor. *Id.* at 941. *Lugar* held that defendants were such joint participants and, therefore, state actors because they "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." *Id.* at 942.

III

Eric Dahlberg likens his case to *Lugar* and urges that the Court's holding there supports his § 1983 claim. The deprivation of Dahlberg's federally-protected right to liberty by his overnight imprisonment is not ques-

tioned. Accordingly, we turn to the two part "fair attribution" test to determine whether his rights were deprived under color of state law. As the ensuing analysis demonstrates, neither prong of the "fair attribution" test has been satisfied.

As previously stated, the state is responsible[4] for violation of plaintiff's constitutional rights whenever that deprivation is *caused* by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. 457 U.S. at 937. The Supreme Court read count one of Lugar's complaint to allege that Virginia's prejudgment attachment statute was procedurally defective under the Fourteenth Amendment. *Id.* at 941. The deprivation of Dahlberg's federally-protected rights is not "caused" by the exercise of some right created by the State in the same sense as was Lugar's. A private party's misuse of New York's Judiciary Law that causes plaintiff to be imprisoned overnight is not fairly attributable to New York State. In *Lugar* the state statute was itself constitutionally defective. Since a State is charged with the responsibility of assuring that its laws are constitutional, a constitutionally defective statute is plainly a product of state action. As such, it was deemed in *Lugar* to have "caused" or "permitted" defendant to seize plaintiff's property.

Plaintiff has not here alleged that New York's procedure for notice and adjudication of contempt is con-

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[4] The use of the word "responsibility" does not imply that actions taken pursuant to state authority will impose legal liability upon the State, but the term means, as Webster's first definition states, only that the deprivation of plaintiff's federally-protected rights is "caused" by the exercise of some right or privilege created by the State.

stitutionally defective. Thus, the present case does not fall within the *Lugar* rationale for state action. In fact, the instant case is more closely related to count two of Lugar's complaint that asserted that the deprivation of property resulted from private party defendants' " 'malicious, wanton, willful, opressive [sic], [and] unlawful acts.' " *Id.* at 940. This allegation did not ascribe conduct to any state governmental decision or action. Instead, it implicitly legitimized the state statute and complained only that the private party defendants had run afoul of the statute. In the words of the Court: "That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. . . . [P]rivate misuse of a state statute does not describe conduct that can be attributed to the State. . . ." *Id.* at 940-41. *See Monroe* v. *Pape*, 365 U.S. 167 (1961) (abuse of authority doctrine).

Private misuse of a state statute is precisely what plaintiff has alleged here. Dahlberg's complaint accuses his ex-wife's lawyers of intentionally or negligently violating the notice provisions of New York Judiciary Law § 756 and thereby causing his subsequent arrest and imprisonment. It is one thing to hold a State accountable for the unconstitutional acts of its legislature, but quite another to charge that State with responsibility where private parties abuse an otherwise valid state law. In the latter case, the State does not sanction such abuse, nor can it prevent it any more than it can stop a private party from committing a crime or tort. Thus, the deprivation of Dahlberg's rights was not caused by the exercise of some right or privilege created by the State.

Nor can the conduct complained of subject defendants to Section 1983 liability for their actions based upon a

rule of conduct imposed by New York. *See Bell* v. *Maryland*, 378 U.S. 226 (1964) (custom alone is insufficient to turn private conduct into state action). As the Supreme Court held in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), the decision to discriminate must be ascribed to a governmental decision, so a private club's racially restrictive policies do not constitute state action subjecting the club to constitutional restraint. Thus, since defendants' actions were not encouraged by any rule of New York—regardless of whether they were intentional or malicious—they may not be viewed as caused by a rule of conduct imposed by the State or a person for whom the State is responsible. Therefore, they are not attributable to the State.

Plaintiff challenges this conclusion by asserting that there are other ways of establishing state responsibility. Specifically citing numerous cases including *Dennis* v. *Sparks*, 449 U.S. 24 (1980), and *Howerton* v. *Gabica*, 708 F.2d 380 (9th Cir. 1983), he attempts to characterize his situation as indistinguishable from them. We agree that state responsibility, the first prong of the fair attribution test, does not inevitably turn on the presence or absence of an unconstitutional state law. *Lugar* makes this clear. Nonetheless, we reject Dahlberg's contention that this case satisfies the state responsibility requirement in some other form.

Dennis v. *Sparks* is quite different from the case at bar. There, the "action under color of state law" requirement of § 1983 was met where plaintiff's complaint alleged a conspiracy between the private party defendants and a state official. 449 U.S. at 28. *Dennis* never discussed Fourteenth Amendment state action or fair attribution of state responsibility. In fact, it was decided nearly two years prior to *Lugar*, which Dahlberg concedes controls.

Even assuming that the Court in *Dennis* implicitly found state action and state responsibility, such a finding does not mandate a similar result here. The *Lugar* test for state responsibility is satisfied where the deprivation of plaintiff's rights is caused "by a rule of conduct imposed by the State or by a person for whom the State is responsible." 457 U.S. at 937. In *Dennis*, the judge who allegedly accepted a bribe and conspired with private parties was obviously a "person for whom the State is responsible." This is also true with respect to the state judges involved in the Dahlberg contempt proceedings. The difference is the presence in *Dennis* and the absence here of an alleged bribe and conspiracy, before such intentional misconduct can be considered a "rule of conduct." Where a state judge's single, isolated error in signing a defective order was due to oversight or negligence, such nonfeasance may hardly be characterized as a rule. A series or pattern of similar negligent acts might arguably establish a rule of conduct for which the State would be responsible. But Dahlberg has not alleged a pattern of behavior, and we do not assume that a state court judge in this or any other case makes a practice of signing defective orders. Moreover, plaintiffs in § 1983 cases need not allege a pattern of behavior in cases like *Dennis* where the state official acts intentionally rather than negligently. The reason is plain. Given an actor's presumed control over his intended actions, one intentional act can signify the presence of a "rule of conduct," even though in its infancy. Thus, there is good reason for an actor to be held responsible for his intentional behavior, as opposed to his mere inadvertence. And, responsibility is of course a touchstone of fair attribution.

A more difficult problem is presented by the Ninth Circuit's decision in *Howerton* v. *Gabica*, *supra*, 708 F.2d

380. There, defendant landlords undertook to evict plaintiff tenants from a rented trailerhouse. In the process defendants prepared a three-day eviction notice that was allegedly defective under state law. They subsequently sought the aid of local police who, together with defendants, evicted the plaintiffs, despite plaintiffs' assertion to the police that the eviction notice unlawfully failed to state the amount of rent due and permit payment of that amount as an alternative to vacating. Plaintiffs also contended that the eviction did not comply with the state's unlawful detainer statute that requires a court order prior to eviction.

The Ninth Circuit ruled that plaintiffs had stated a cause of action against the landlords under § 1983. In particular, it held that the action taken by the landlords was "under color of state law" since it involved significant state involvement. 708 F.2d at 382. Taking note of *Lugar*, the *Howerton* court determined that where "police involvement becomes increasingly important, repossession by private individuals assumes the character of state action." *Id.* at 383. Consequently where private individuals invoke the authority of state officials, such as the police, to put the weight of the State behind their decision to evict, they fall within the "abuse of authority" doctrine. *Id.* at 384 n.9 (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. at 940). *See Monroe* v. *Pape*, *supra*.

While the circumstances in *Howerton* and the instant case are similar, we observe that although the Howertons called the police officer's attention to the defects in the notice, the police proceeded to enforce the eviction anyway, even to the extent of one officer visiting the Howertons' residence to tell them the defendant's eviction procedures were proper and that they should quit the premises. *Id.*

at 381. That is quite unlike the conduct of a judge who unknowingly signs a defective order that has been prepared and submitted to him by an attorney. Hence, regardless of their similarities, we perceive factual distinctions in the circumstances of the two cases. Again, the question of state involvement is always a factual inquiry and, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

IV

Despite the conclusion that here there is no state action, we think it necessary in light of the alluded to uncertain cross-currents that envelop state action to discuss our reasons for also concluding that defendants are not state actors. Bearing in mind that it requires both state action and a state actor for plaintiff to state a viable cause of action under § 1983, a failure sufficient to allege either defeats plaintiff's cause. While Ellen Dahlberg's lawyers are not state officials, the question nonetheless remains whether under any one of several theories they may still be considered state actors. Aside from the field of prejudgment attachment, several theories have evolved that when properly alleged suffice to tie a private person so closely to governmental actions that a court will hold the private actor's conduct subject to suit for violating another's constitutional rights. Thus, a private party may be held a state actor when the complained of conduct results from a state agent's encouragement or command, the state and private actor jointly participate in depriving plaintiff of his rights, the granting of benefits to a private actor by the state inseparably links them together, or the

private actor undertakes to perform activities ordinarily exclusively engaged in by government. As the ensuing discussion demonstrates none are applicable to the claims before us.

First, nothing before us suggests that the state judicial officers commanded or encouraged defendants in their decision to invoke state process against plaintiff. Second, the joint participation theory—adopted as the rationale in *Lugar*—does not fit this case when it is compared to those cases finding state action on that theory. For example, the government agent and the thugs laying in wait for the victims in *United States* v. *Price*, 383 U.S. 787 (1965), carried out a deliberate, previously agreed upon plan. In *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970), the state agent's joint participation with Kress employees was found to constitute a conspiracy or meeting of the minds.

The complaint in this case simply alleges that Ellen Dahlberg and her attorneys acted "in concert with state and county officials" to imprison plaintiff. No claim is made—and on the facts in the record none could be—that the different state judges actually entered into a conspiracy or had a meeting of the minds with the attorney defendants as in *Price* and *Adickes* to deprive plaintiff of his liberty. See *Dennis* v. *Sparks*, *supra*, 449 U.S. 24. Further, the mere invocation by defendants of New York's legal procedures does not constitute joint participation so as to satisfy the statutory requirement under § 1983 that there be a state actor. *Lugar* at 939 n.21. While entanglement by the private actor with the State may lead to a conclusion that there is a conspiracy or meeting of the minds between private parties and state officials to engage in conduct to deprive a plaintiff of

constitutional rights, the action of the state court judges and the sheriff [5] in this case do not establish any meeting of the minds or intent to conspire with defendants to imprison plaintiff.

Third, there is no basis for finding an inseparable linking or symbiotic relationship arising from any benefits granted by the state to these defendants as in *Burton* v. *Wilmington Parking Authority*, *supra*, 365 U.S. 715. Finally, the exclusivity doctrine has no application here. That doctrine applies where the private party undertakes to perform a function exclusively performed by government, for example, elections, *see Terry* v. *Adams*, 345 U.S. 461 (1953), or running a company-owned town, *see Marsh* v. *Alabama*, 326 U.S. 501 (1946). More traditional business activities, like the operation of a public utility, *see Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), are not so exclusive. Thus, in *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978), the use of state law patterned on the Uniform Commercial Code as a method of dispute resolution between a debtor and creditor was private activity. In *Flagg Brothers* the defendant warehouseman who had a lien on plaintiff's goods in his possession arising from unpaid storage charges sold plaintiff's property. The Supreme Court held it unnecessary to examine whether the law itself or the actions of the warehouseman violated due process because defendant's actions were entirely private. Similarly, the parties' matrimonial dispute in New York involving unpaid alimony and attorneys' fees are not matters exclusively

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[5] Sheriff Stoddard is no longer a party to this action since the cause of action against him, pursuant to Fed. R. Civ. P. 41(a), was dismissed by stipulation and order filed February 2, 1984.

relegated to the State. On the contrary, this kind of dispute is ordinarily resolved by institution of an action between private parties. Therefore, the exclusivity theory does not transform defendants into state actors. Since none of these theories provides a ground for holding defendants to be state actors, we conclude that they are not.

V

In concluding that plaintiff failed to state a cause of action under 42 U.S.C. § 1983 because there was no demonstration either of state action or a state actor, we do not mean to suggest that plaintiff is without a remedy. The incidents alleged may well support a tort action in state court. We simply conclude that the events recounted here do not provide a basis for a federal claim.

District Court Decision

Eric DAHLBERG, Plaintiff,

v.

Carl F. BECKER; Govern, McDowell & Becker; Ellen M. Dahlberg and Harvey E. Stoddard, Jr., Defendants.

Carl F. BECKER; Govern, McDowell & Becker, Third-Party Plaintiffs,

v.

Herbert JORDAN, Randlett Walster, and Jordan & Walster, Third-Party Defendants.

No. 83-CV-944.

United States District Court,
N.D. New York.

Jan. 3, 1984.

MEMORANDUM-DECISION and ORDER

MINER, District Judge.

I

This action arises out of the alleged violations of plaintiff's civil rights by defendants Ellen M. Dahlberg, Carl F. Becker, Mr. Becker's law firm, Govern, McDowell & Becker, and Harvey E. Stoddard, Jr., sheriff of Schoharie County, New York. The action is brought pursuant to 42

U.S.C. § 1983, and jurisdiction is predicated upon 28 U.S.C. §§ 1331 and 1343. Before this Court are defendant Ellen Dahlberg's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6); third party defendants Jordan & Walster's motion to dismiss the third party complaint of defendants Carl Becker and Govern, McDowell & Becker, Fed.R.Civ.P. 12(b)(6), and to disqualify the law firm of Roche and Wolkenbreit, P.C. from its representation of Ellen Dahlberg, and the law firm of Kernan and Kernan, P.C. from its representation of defendants Becker and Govern, McDowell & Becker based on Canons 4, 7, and 9 of the Code of Professional Responsibility.[1]

II

The unfortunate familial discord which underlies the instant action began, insofar as relevant to this action, in November of 1981 when plaintiff Eric Dahlberg commenced divorce proceedings against his wife Ellen. Mrs. Dahlberg answered the complaint which had been served upon her by her husband and counterclaimed for her own divorce. Apparently, after negotiations between the parties, it was agreed that a judgment of divorce would be entered in favor of Ellen. A stipulation was entered into between the parties on March 12, 1982, and a judgment of divorce was signed on June 30, 1982, apparently adopting the terms of the stipulation.

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[1] Defendants Carl Becker and Govern, McDowell & Becker have also moved to stay the taking of certain depositions pursuant to Fed.R.Civ.P. 26(c). That motion was granted in an oral decision from the bench on October 28, 1983, at which time the Court stayed all discovery pending resolution of the remaining motions.

District Court Decision

In November of 1982, the defendant attorneys prepared an order to show cause why plaintiff Eric Dahlberg should not be punished for contempt for allegedly having failed to make certain payments required by the divorce decree. The order to show cause was based on an affirmation of defendant Becker as well as an affidavit by Ellen Dahlberg and was made returnable on December 16, 1982. Eric Dahlberg never appeared on the return date of the order to show cause. Accordingly, sometime in May of 1983, the defendant attorneys prepared and obtained a commitment order providing for plaintiff's arrest until certain attorney's and maintenance fees were paid and a promissory note in favor of his former wife Ellen was executed. On June 7, 1983, a deputy of defendant Sheriff Stoddard arrested Eric Dahlberg and transported him to the Schoharie County jail. At the jail, certain sheriff's employees informed plaintiff that in order to obtain release he would have to pay $250.00 in fees to Mrs. Dahlberg's attorneys and $300.00 in maintenance payments as well as execute a promissory note and certain financing statements. Plaintiff was then brought before a county court judge who ordered him held without bail. Later that day, friends of plaintiff provided him with the necessary funds and the promissory note. Despite plaintiff's willingness to execute the note, the county court judge refused to order his release without authorization from a justice of the supreme court or from Ellen Dahlberg's attorneys, since the judge was unable to determine if the promissory note and financing statements were those required by the commitment order. Consequently, plaintiff was confined in the county jail overnight. It was not until the next morning that Ellen Dahlberg's attorneys called the county court judge and authorized plaintiff's release.

District Court Decision

The gravamen of plaintiff's complaint is that these defendants, acting under color of state law, effected an unlawful seizure and imprisonment of plaintiff's person, thereby depriving him of his fourth amendment rights. In particular, plaintiff claims that the defendant attorneys and defendant Ellen Dahlberg "intentionally caused an unreasonable seizure of plaintiff's person . . . [and] intentionally caused the false arrest and imprisonment of plaintiff in violation of the Fourth Amendment . . ." by (1) intentionally preparing a false affidavit and presenting it to a court as a basis for obtaining valuable notes and instruments; (2) intentionally and/or negligently omitting from the order to show cause the notice and warning required by section 756 of the New York Judiciary Law; (3) intentionally and/or negligently serving an order to show cause for contempt upon an attorney whose authority had expired, in violation of section 761 of the New York Judiciary law; (4) intentionally and/or negligently failing to supply a promissory note and financing statements with the commitment order or failing to describe these documents so that they could be identified by the judge before whom plaintiff was brought. (Complaint, ¶ 32(a)-32(f).). With respect to defendant Stoddard, plaintiff claims that he caused plaintiff to be "needlessly and unreasonably subjected to excessive force, and degrading and humiliating treatment. . . ." (Complaint, ¶ 33). On the basis of these allegations, plaintiff seeks compensatory damages totaling $150,000.00.

III

[1,2] It is well settled that a complaint should not be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for failure to

state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *accord Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Weisman v. LeLandais,* 532 F.2d 308, 310-11 (2d Cir. 1976) (per curiam). In deciding a motion to dismiss, the factual allegations in the complaint must be taken as true. *Kugler v. Helfant,* 421 U.S. 117, 125 & n. 5, 95 S.Ct. 1524, 1531 & n. 5, 44 L.Ed.2d 15 (1975); *Fine v. City of New York,* 529 F.2d 70, 75 (2d Cir.1975). Here, even taking plaintiff's allegations as true, this Court concludes that plaintiff's complaint fails to state a claim against the moving defendant.

IV

[3] The threshold inquiry in a § 1983 action is twofold. The Court must consider both whether the conduct complained of was committed by a person acting under color of state law as well as whether that conduct deprived a person of rights, privileges, or immunities secured by the Constitution. *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970). Because this Court concludes that defendant Ellen Dahlberg's actions were not taken under color of state law, consideration of plaintiff's alleged constitutional deprivations is unnecessary.

A. *Ellen Dahlberg's motion to dismiss*

It is plaintiff's position that defendant Ellen Dahlberg acted under color of state law by invoking the aid of state

officials to effect a seizure of plaintiff's person in pursuit of her private pecuniary interests. Defendant, on the other hand, contends simply that under well settled § 1983 doctrine, her actions may not be said to have been taken under color of state law. Both parties point to the relatively recent Supreme Court decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), and, not surprisingly, urge differing interpretations of that decision.

In essence, the *Lugar* decision held that a private creditor who obtained an ex parte prejudgment attachment order from a state court judge could be sued under § 1983. The Court found that the actions of the state judge constituted state action and that the actions of the creditor were taken under color of state law. The test for state action or action taken under color of state law enunciated by the Court was twofold.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. at 937, 102 S.Ct. at 2754. For the reasons which follow, this Court is persuaded that the holding of *Lugar* does not, as plaintiff contends, dictate a finding that defendant Ellen Dahlberg acted under color of state law.

Concededly, the precise holding of *Lugar* is an elusive one and has generated, even in its infancy, a host of judicial attempts to effect its proper application. *See, e.g.*,

Long v. Citizen's Bank & Trust Co., 563 F.Supp. 1203, 1211 (D.Kan.1983). Notwithstanding any apparent uncertainty spawned in the wake of *Lugar*, this Court concludes that that decision proves unavailing to plaintiff.

As an initial matter, it is important to note that the *Lugar* majority expressly limited its holding that state action exists where a private party invokes a state's legal procedures solely to cases involving prejudgment attachment procedures. Specifically, the Court held:

> Contrary to the suggestion of JUSTICE POWELL'S dissent, we do not hold today that "a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the § 1983 requirement of action under color of law." *Post*, at 951. *The holding today, as the above analysis makes clear, is limited to the particular context of prejudgment attachment.*

457 U.S. at 939 n. 21, 102 S.Ct. at 2755 n. 21 (emphasis added). Following the decision in *Lugar*, courts confronted with the question of whether private action may be held to have been taken under color of state law have been unanimous in giving heed to the Court's footnote and expressly limiting the holding of that case to the context of prejudgment attachment. *See Deal v. Newport Datsun Ltd*, 706 F.2d 141, 142 (4th Cir.1983); *Wilson v. Pfeiffer*, 565 F.Supp. 115, 118 (S.D.N.Y.1983); *Lee v. Patel*, 564 F.Supp. 755, 759 (E.D.Va.1983); *Long v. Citizen's Bank & Trust Co.*, 563 F.Supp. 1203, 1214-15 (D.Kan.1983).

Even more importantly, however, it is clear that the factual situation underlying plaintiff's allegations of defendants' actions having been taken under color of state law

fails to bring this case within the test enunciated by the *Lugar* Court. Significantly, the Court there viewed as "essential to the proper disposition of the case" determination of whether the state attachment *procedure* which prompted the litigation was itself unconstitutional. 457 U.S. at 940, 102 S.Ct. at 2755. Ultimately, the Court concluded that the plaintiff there had in fact challenged the state statute as procedurally defective under the fourteenth amendment. *Id.* at 941, 102 S.Ct. at 2756. In the present case, no such attack on the New York State contempt procedures has been made. Indeed, plaintiff merely has alleged an abuse of those procedures by these defendants. The *Lugar* Court carefully detailed the analysis to be employed in such a situation:

> Petitioner presented three counts in his complaint. Count three was a pendent claim based on state tort law; counts one and two claimed violations of the Due Process Clause. Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, opressive [*sic*], [and] unlawful acts." By "unlawful," petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, *i.e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961).

> *That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.*

457 U.S. at 940, 102 S.Ct. at 2756 (emphasis added). The Court concluded its discussion of the requirement that a state statute or procedure be challenged as defective in order for a private party's violation of it to be deemed under color of state law by noting that "[w]hile private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well." 457 U.S. at 941, 102 S.Ct. at 2756.[2]

[4] It is clear, therefore, that the present case involves a situation wholly distinct from that underlying *Lugar*. Indeed, the facts here fit precisely within the category which the Court expressly held not to warrant a finding of color of state law. Because plaintiff has raised no objection here to the constitutional validity of New York's contempt procedures, but rather has challenged only the misuse or abuse of those procedures by these defendants, defendants' actions cannot be said to have been taken under color of state law.

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[2] In summarizing its holding, the Court reiterated: "Petitioner did present a valid cause of action under § 1983 insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute." 457 U.S. at 942, 102 S.Ct. at 2757 (footnote omitted).

District Court Decision

In *Henson v. Bethlehem Steel Corp.*, 564 F.Supp. 497 (D.Md.1983), six former employees of the defendant corporation brought a § 1983 action against the corporation and two doctors employed by it. The complaint charged that the plaintiffs had suffered personal injuries resulting from their exposure to asbestos and silica dust, fibers and particulates in the course of their employment. Essentially, the plaintiffs complained of due process and equal protection violations stemming from the defendant doctors' concealment from state and federal agencies of the health risks faced by plaintiffs. In dismissing the claims, the district court relied on the holding of *Lugar*, and concluded that mere misuse or abuse of a state statute by a private doctor is not action taken under color of state law. Specifically, the court held:

> Considered under the two-part approach approved in *Lugar*, the acts of Dr. Franz complained of by plaintiffs are not "fairly attributable to the state." First, Dr. Franz's acts of concealment were not "caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state." Indeed, plaintiffs themselves allege that Dr. Franz's acts were in direct contravention of his duties under state statutory and common law, as well as under the standards of his profession.
>
> . . . .
>
> In sum, plaintiffs' section 1983 claims do not challenge the lawfulness of actions taken by Dr. Franz, the other two defendant physicians or Bethlehem "under color of state law." Plaintiffs

> challenge only actions which at most may constitute misuse or abuse of powers and duties by Dr. Franz as a private citizen. . . .

Id. at 503, 505.

A case even more closely analogous to the present one is *Lee v. Patel,* 564 F.Supp. 755 (E.D.Va.1983). There, defendant was faced with a § 1983 action alleging a fourteenth amendment due process violation. The action was precipitated when defendant, a motel owner, filed a complaint and accompanying sworn statements with the local magistrate resulting in plaintiffs' arrest for failure to pay rent. Concluding that defendant's actions had not been taken under color of state law, the court granted the defendant's motion to dismiss. Finding plaintiffs' reliance on certain language[3] in the *Lugar* Court's decision misplaced, the court proceeded to distinguish the *Lugar* decision. The court pointed first to the limiting statement contained in footnote 21 of the *Lugar* opinion and concluded that the decision could not be applied outside of the prejudgment attachment context. The court next observed that

> the Court in *Lugar* emphasized that a complaint that does not challenge the constitutionality of a State statute but merely alleges misuse of the State statute by a private person "does not state a cause of action under § 1983 but challenges only private action."

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[3] Specifically, plaintiffs pointed to the *Lugar* Court's statement that the "joint participation" contemplated in *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), required nothing more than "invoking the aid of state officials." 564 F.Supp. at 759.

564 F.Supp. at 759 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. at 940, 102 S.Ct. at 2756). The court concluded that

> [t]hough "the procedural scheme created by the statute obviously is the product of state action," . . . without a procedural challenge to the State statute on due process grounds plaintiffs' § 1983 claim fails to establish that defendant, a private person, engaged in State action under the due process clause and action under color of State law under § 1983.

564 F.Supp. at 759 (quoting 457 U.S. at 941, 102 S.Ct. at 2756).[4]

Finally, of some note is the language of the district court in *Long v. Citizen's Bank & Trust Co.*, 563 F.Supp. 1203 (D. Kan. 1983) in the context of its rather thorough discussion of the implications of the *Lugar* decision.

> It is obvious that the constitutionality of a state prejudgment attachment scheme is not properly in question when the provisions of that scheme have been disregarded by the private party creditor. Only when the private party creditor has properly invoked the statutory scheme and met its requirements may the deprivation of a property interest properly be traced to that scheme, and only then would the injured plaintiff have standing to

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[4] As in the present case, the court in *Patel* noted that the thrust of plaintiffs' complaint was that the defendants *failed* to follow the relevant state procedures for obtaining the relief sought. 564 F.Supp. at 759.

challenge the constitutionality of that scheme. The interrelationship between these observations and the first part of the *Lugar* test is apparent: the "exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible" requires that the state provide a right or privilege and that the creditor *properly* invoke it. Abuse or misuse of a right or privilege is not the exercise of that right or privilege, and the constitutionality of the state's efforts to provide that right or privilege cannot properly be challenged when it has not been exercised. The Supreme Court's insistence on a constitutional challenge as a predicate to a cause of action under § 1983 in the limited context of prejudgment attachments is therefore both rational and conceptually defensible, albeit not particularly well expressed in the maze of dissenting and concurring[5] judicial dialects.

. . . .

Because the plaintiff in this case has expressly disavowed any constitutional attack on any Kansas statute, and because he alleges that the prejudgment attachment of his Jeep was not performed in accordance with the requirements of Kansas law, he fails to present a valid cause of action under § 1983. . . .

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[5] In fact, there were no concurring opinions contained in the *Lugar* decision. Justice White delivered the opinion of the court in which Justices Brennan, Marshall, Blackman and Stevens joined. Chief Justice Burger filed a brief dissent. Justice Powell also filed a dissenting opinion in which Justices Rehnquist and O'Connor joined.

Id. at 1215 (emphasis in original).

It should be noted that plaintiff has cited other cases suggested to support a finding that these defendants acted under color of state law. In particular, plaintiff cites *Howerton v. Gabica,* 708 F.2d 380 (9th Cir. 1983), and *Ragosta v. Vermont,* 556 F.Supp. 220 (D.Vt. 1981), *aff'd mem.,* 697 F.2d 296 (2d Cir. 1982). It is clear, however, that both of these cases are distinguishable from the present dispute. *Howerton* involved a § 1983 action against a landlord for an allegedly unlawful eviction under a state detainer statute. In reversing the district court's dismissal of the action, the Ninth Circuit premised its holding on the fact that local police officers' affirmative assistance in the physical eviction provided sufficient evidence of state action. Indeed, the court noted that the actions of the police "created an appearance that the police sanctioned the eviction." 708 F.2d at 384. In a footnote, the court took note of the holding in *Lugar* that "the fact '[t]hat respondents invoked the [attachment] statute without grounds to do so could in no way be attributed to a state rule or decision," 708 F.2d at 384 n. 9 (quoting *Lugar v. Edmondson,* 457 U.S. at 940, 102 S. Ct. at 2756), but felt that the case before it was clearly distinguishable "because the [plaintiffs] in this case allege that the [defendants] invoked the authority of specific state officials, the Kooskia police, to put the weight of the state behind their private decision to evict. The case therefore falls within the 'abuse of authority' doctrine of *Adickes, [United States v.] Price* [86 S.Ct. 1152, 16 L.Ed.2d 267 (1966)], and *Monroe v. Pape* that the Court explicitly recognized in *Lugar.*" 708 F.2d at 384 n. 9.

Plaintiff cites *Ragosta* "for the proposition that participants in private litigation act under color of state law when they maliciously violate an individual's civil rights

through the knowing abuse of the legal process." (Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss at 5). Without extended discussion, it is obvious upon even a cursory reading of the *Ragosta* opinion that it provides little support for plaintiff's position. Essentially, the decision simply reiterates the now well settled principle that such an action will not lie unless the legal remedies allegedly abused have "already been held unconstitutional by the appellate courts." 556 F.2d at 227. Indeed, the *Ragosta* court expressly found an absence of any action under color of state law stemming from a wife's institution of divorce proceedings. As to the wife, the court found no " 'joint action' involving state employees which would support a section 1983 suit." *Id.* As to the wife's attorneys, the court expressed reasoning similar to that contained in *Lugar,* holding no state action to exist absent a constitutionally infirm state procedure invoked by the defendants.

Finally, plaintiff directs the Court's attention to *Dennis v. Sparks,* 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), and argues that one who conspires with an immune state official may himself be liable under § 1983. It is not necessary, however, to address this particular theory, since plaintiff's complaint is lacking entirely in any allegation or even hint of conspiracy. "The color of state law requirement will not be satisfied by claims against private defendants . . . absent allegations that they conspired with state officials." *Rios v. Marshall,* 530 F.Supp. 351, 361 (S.D.N.Y. 1981); *see also Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970); *Fine v. City of New York,* 529 F.2d 70, 74 (2d Cir. 1975); *Lee v. Patel,* 564 F.Supp. 755, 760-61 (E.D.Va. 1983). The fact that defendant Ellen Dahlberg "merely resort[ed] to the courts . . . does not make [her] a co-

conspirator or a joint actor with the judge." *Dennis v. Sparks,* 449 U.S. 24, 28, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980).

Because it is clear that Ellen Dahlberg was not acting under color of state law, her motion to dismiss the complaint must be granted.

[5] Based on the foregoing analysis, this Court concludes that it must dismiss the complaint insofar as it relates to the defendant attorneys as well, notwithstanding the fact that these defendants have not moved for such relief. It is well settled that the court is empowered to dismiss a complaint sua sponte for failure to state a claim. *Leonhard v. United States,* 633 F.2d 599, 609 n. 11 (2d Cir. 1980), *cert. denied,* 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981); *Robins v. Rarback,* 325 F.2d 929 (2d Cir. 1963), *cert. denied,* 379 U.S. 974, 85 S.Ct. 670, 13 L.Ed.2d 565 (1965); *Patton v. Dumpson,* 498 F.Supp. 933, 935 n. 1 (S.D.N.Y. 1980); 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1357 at 593 & n. 43.

. *Plaintiff's motion to disqualify counsel*

Plaintiff also seeks to disqualify the firm of Roche and Wolkenbreit from its representation of Ellen Dahlberg. The basis for the disqualification motion is the following: In support of defendant Ellen Dahlberg's motion to dismiss, counsel submitted an affidavit of Michael E. Breen, plaintiff's counsel in the divorce proceeding. Essentially, the affidavit discloses that plaintiff had consented to the contempt order which serves as the basis for the present action. Moreover, plaintiff now suggests that it seems clear that Ellen's attorneys have had discussions with Mr. Breen relating to his former representation of plaintiff. Plaintiff objects strenuously to defense counsel's

use of the affidavit and other information he assumes to have been gathered from communications with Mr. Breen. In particular, plaintiff argues that any information conveyed by Mr. Breen represented a breach of the confidential relationship between attorney and client and thereby compels disqualification of the firm, which has now come into possession of these confidential communications. Without deciding the issue of any alleged impropriety, it is clear that this Court's disposition of the motion to dismiss makes unnecessary any consideration of the disqualification motion. Because Ellen Dahlberg is no longer a party to the present action, any motion to disqualify her counsel has been rendered academic.

By way of an amended motion, plaintiff also seeks to disqualify the firm of Kernan and Kernan which represents defendant Carl Becker and the defendant law firm of Govern, McDowell & Becker. Again, because this Court already has dismissed the claims against these defendants, there is no need to reach the question of disqualification.

In addition to seeking disqualification of the various counsel, plaintiff requests an order striking from the record, or sealing, the affidavit of attorney Breen as well as requiring surrender to plaintiff's counsel for destruction of all copies of the affidavit. For a number of reasons, this Court finds plaintiff's request unwarranted.

[6, 7] Assuming that the affidavit does contain confidential information, it is clear that no protection of that matter is now owing. First, since the affidavit has already been filed in connection with a pending New York State Supreme Court action, the content of the affidavit is now a public document and no reason exists to have it sealed in these proceedings. *See Teachers Insurance and Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F.Supp. 638, 641 (S.D.N.Y. 1981); *S.E.C. v. Gulf &*

Western Industries, Inc., 518 F.Supp. 675, 683 (S.D.N.Y. 1981). More importantly, it is also clear that Eric Dahlberg has waived any privilege of confidentiality he may have enjoyed by disputing the Breen recounting and putting into issue his own version of his encounters and discussions with Breen. As such, any communications with Breen have lost their confidential nature and are no longer subject to suppression through assertion of the attorney/client privilege. *See Status Time Corp. v. Sharp Electronics Corp.*, 95 F.R.D. 27, 34 (S.D.N.Y. 1982).

Finally, since the only remaining defendant in the present action is Sheriff Harvey Stoddard, it is noteworthy that plaintiff has expressly conceded that possession of the Breen affidavit by Sheriff Stoddard or his attorneys is unobjectionable. In a footnote to plaintiff's "Memorandum of Law in Support of Motion to Strike Affidavits . . .," plaintiff acknowledges the following:

> There is a fourth defendant, Sheriff Harvey E. Stoddard, Jr., represented by Maynard, O'Connor & Smith. Plaintiff does not seek their disqualification because, although they came into possession of the Breen affidavit, the information is not relevant to plaintiff's claim against the sheriff and therefore it does not prejudice plaintiff. The Maynard firm has not attempted to make any use of it.

(Plaintiff's memorandum at 2 n. *).

It therefore is clear to this Court that no grounds exist warranting either sealing or striking from the record the Breen affidavit.

C. *Third party defendants' motion to dismiss defendant attorneys' third party complaint.*

The attorney defendants filed, soon after this action was commenced, a third party complaint against plaintiff's counsel, Jordan & Walster. That complaint charges essentially that Jordan & Walster undertook representation of plaintiff prior to and with knowledge of the contempt proceeding, but failed to extricate plaintiff from the travails he faced in that proceeding. Accordingly, third party plaintiffs assert that Jordan & Walster is itself responsible for any harm suffered by plaintiff Eric Dahlberg and that third party plaintiffs are therefore entitled to indemnification for any damages which may be awarded plaintiff. Moreover, third party plaintiffs allege that Jordan & Walster "conspired with the plaintiff herein [Eric Dahlberg] and intentionally and willfully allowed the plaintiff to fail to purge himself of contempt and intentionally failed to take legal steps to vacate the contempt order and knowingly allowed plaintiff to be incarcerated for the purpose of creating an alleged federal cause of action." (Third party complaint, ¶ 5). As to this claim, third party plaintiffs seek $100,000.00 in punitive damages. Third party defendant Jordan and Walster has moved to dismiss the third party complaint for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6).[6]

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[6]It also appears that plaintiff seeks to have the third party complaint stricken pursuant to Fed. R.Civ.P. 14(a).

[7]To the extent the third party complaint alleges a § 1983 cause of of action, it fails to state a claim for the precise reason that plaintiff's complaint so fails, namely, a failure to establish the color of state law requirement.

[8] On the basis of the rather skeletal third party complaint, it is not clear whether third party plaintiffs attempt to allege federal or state law claims. This Court is persuaded, however, that no colorable federal claim[7] has been asserted. Moreover, the claim for indemnification is rendered academic in light of this Court's disposition of the main claims. What remains, therefore, is what appears to be a state tort claim susceptible of perhaps two different labels. The complaint asserts claims either for malicious prosecution or for the unique New York concept of prima facie tort. For the foregoing reasons, this Court concludes that whatever the rubric, these third party claims also will be dismissed.

[9-11] Because these claims are unsupported by either federal question or diversity jurisdiction, the only proper jurisdictional predicate is found in the form of ancillary jurisdiction. *See Moore v. New York Cotton Exchange,* 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926). It is now well settled that whether or not to entertain ancillary state law claims lies within the discretion of the district court. *See generally* 6 C. Wright & A. Miller, *Federal Practice & Procedure* § 1444 at 234-35 and cases cited therein. Where the main action has been dismissed before trial, dismissal of the ancillary state claims is particularly appropriate. *Federman v. Empire Fire & Marine Insurance Co.,* 597 F.2d 798, 811 (2d Cir.1979); C. Wright, *Law of Federal Courts* 515 (4th ed. 1983). Here, although the entire federal action has not been dismissed, that part relevant to defendants' third party claim, and to which that claim is ancillary, is no longer before this Court. Because the third party claim is essentially unrelated to the federal claim now before the Court, the Court, in its discretion, chooses not to entertain this claim. *See Owen Equipment and Erec-*

tion Co. v. Kroger, 437 U.S. 365, 375-76, 98 S.CT. 2396, 2403, 57 L.Ed.2d 274 (1978) ("not mere factual similarity but logical dependence" required for proper invocation of ancillary jurisdiction); *Finkel v. United States,* 385 F.Supp. 333, 336 (S.D.N.Y.1974) (no ancillary jurisdiction where third party state claims "pose[d] issues basically irrelevant to the one presented by the federal action").

Moreover, this Court is persuaded that in the interest of "judicial economy, convenience and fairness to litigants," *see United Mine Workers v. Gibbs,* 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966), the exercise of such jurisdiction would be an imprudent course. Were the third party complaint to be maintained as part of the present action, plaintiff Eric Dahlberg would be confronted with the unfortunate situation of having his claim argued by a law firm that was a third party defendant. Certainly, the conflict of interest that would necessarily develop would not be in plaintiff's best interest and he almost certainly would require substitution of counsel. To force plaintiff into such a posture at this stage of the litigation could well serve to prejudice his cause, even if only financially. Accordingly, the third party claims are better relegated to a state forum.

D. *Attorneys' fees*

All moving parties have requested that the Court award them reasonable attorneys' fees. Defendant Ellen Dahlberg's request is based on 42 U.S.C. § 1988.[1] Third

[1]42 U.S.C. § 1988 provides, in relevant part: In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

party defendant Jordan & Walster bases its request on Fed.R.Civ.P. 11.[9] For the reasons which follow, both requests for fees are denied.

[12, 13] With respect to defendant Ellen Dahlberg, it is of course true that she is a prevailing party and therefore entitled, in the Court's discretion, to an award of fees pursuant to 42 U.S.C. § 1988. *Milwe v. Cavuoto,* 653 F.2d 80, 82 (2d Cir.1981). However, the standard by which fees are to be awarded to successful § 1983 defendants is somewhat stricter than that governing awards to prevailing plaintiffs. A fee award to a prevailing defendant is appropriate only upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation. *See Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 420-421, 98 S.Ct. 694, 699-700, 54 L.Ed.2d 846 (1978) (Title VII); *Mid-Hudson Legal Services, Inc. v. G & U, Inc.,* 578 F.2d 34, 37 (2d Cir.1978). The present case "is hardly the paradigm

[9]Fed.R.Civ.P. 11 provides, in relevant part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

of frivolity or unreasonableness which has led courts in the past to award attorney's fees to prevailing defendants." *Turner v. Lynch,* 534 F.Supp. 686, 689 (S.D.N.Y.1982). Accordingly, defendant Ellen Dahlberg's application for attorney's fees is denied.

[14] With respect to third party defendant Jordan & Walster's Rule 11 application, this Court does not find, on the basis of the record before it, that defendant Ellen Dahlberg's conduct of the third party action was either frivolous or represented a bad faith attempt to wilfully abuse the judicial process. *See Nemeroff v. Abelson,* 704 F.2d 652 (2d Cir.1983) (fee award under Rule 11 upheld where suit was continued without colorable claims in bad faith); *Andre v. Merrill Lynch Ready Assets Trust,* 97 F.R.D. 699, 702-03 (S.D.N.Y.1983) (Rule 11 fee award where baseless and frivolous suit advanced for purposes of harassment and coercion). This conclusion is particularly warranted in light of the fact that the Court has, by its disposition of the third party claim, not passed judgment on the merits of that claim. Accordingly, Jordan & Walster's request for an award of attorney's fees is similarly denied.

E. *Rule 54 certification*

As a final matter, plaintiff has requested that should the Court grant defendant's motion to dismiss, it certify, pursuant to Fed.R.Civ.P. 54(b) that "there is no just reason for delay . . ." and that it direct the entry of a final judgment for purposes of an interlocutory appeal. At the outset, it should be noted that the court is granted considerable discretion in its decision whether or not to issue a Rule 54 certificate. *Cold Metal Process Co. v. United*

Engineering & Foundry Co., 351 U.S. 445, 452, 76 S.Ct. 904, 908, 100 L.Ed. 1311 (1956); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437, 76 S.Ct. 895, 900, 100 L.Ed. 1297 (1956); *see generally* 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2659 at 97-98 (1983). "Because of the strong federal policy against piecemeal review several courts have stated that the district court should make the express determination only in the infrequent case in which a failure to do so might have a harsh effect." *Id.* at 99 (footnotes omitted). Plaintiff argues here that the threat of piecemeal appeals is more than offset by the prospect of piecemeal trials should the decision of this Court on the instant motions ultimately be reversed.[10] This Court is persuaded, however, that the circumstances of the present case do not meet the requirements for Rule 54 certification, and, accordingly, such certification will not issue.

[15] First, contrary to plaintiff's contention, there is substantial factual interdependence between the adjudicated and unadjudicated matters herein involved. While it is true, as plaintiff suggests, that the fundamental legal issue underlying the moving defendant's position, i.e., no color of state law, is not called into play in the claim against Sheriff Stoddard, all the factual allegations necessarily are the same. Moreover, it is clear that plaintiff will not be prejudiced by the delay attendant upon a later appeal. "[S]ome showing must be made by [plaintiff] in order to overcome the normal rule that no appeal be heard until the entire case has been completed." 10 C. Wright,

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[10]Plaintiff's hopes for a reversal in this case are certainly not as well founded as they might be were the appealable issue one involving a "controlling question of law as to which there is substantial ground for difference of opinion . . . ." 28 U.S.C. § 1292(b).

A. Miller & M. Kane, *Federal Practice & Procedure* § 2659 at 100 (footnotes omitted). Here, plaintiff has simply failed to show "some danger of hardship or injustice through delay which would be alleviated by immediate appeal." *Campbell v. Westmoreland Farm, Inc.*, 403 F.2d 939, 942 (2d Cir.1968).

V

On balance, this Court concludes that plaintiff's complaint fails to state a claim against defendants Ellen Dahlberg, Carl Becker, and Govern, McDowell & Becker. Accordingly, Ellen Dahlberg's motion to dismiss is granted. Similarly, the complaint is also dismissed as against defendants Becker and Govern, McDowell & Becker, notwithstanding these defendants' failure to so move. Plaintiff's motion to disqualify the various defense counsel is denied as moot, and the motion to seal or strike the Breen affidavit is denied for the reasons set forth above. Plaintiff's motion to dismiss the third party claim is granted, inasmuch as the Court declines, in its discretion, to exercise ancillary jurisdiction over these claims. Finally, all moving parties' requests for awards of attorneys' fees are denied. This Court's prior stay of discovery hereby is vacated with respect to the remaining parties.

It is so Ordered.

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nine day of November one thousand nine hundred and eighty-four.

Present: Hon. Thomas J. Meskill, Hon. Richard J. Cardamone, Hon. Max Rosenn*

Circuit Judges,

ERIC DAHLBERG,

Plaintiff-Appellant,

v.

CARL F. BECKER: GOVERN, MCDOWELL & BECKER: ELLEN M. DAHLBERG: and HARVEY E. STODDARD, JR.,

Defendants,

CARL F. BECKER: GOVERN, MCDOWELL & BECKER: and ELLEN M. DAHLBERG,

Defendants-Appellees.

84-7219

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*Honorable Max Rosenn, United States Circuit Judge for the Third Circuit, sitting by designation.

Court of Appeals Judgment

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH,
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk